United States Senate
WASHINGTON, DC 20510

July 25, 2019

The Honorable Ajit V. Pai
Chairman
455 12th Street SW
Washington, DC 20544

Dear Chairman Pai:

We write concerning your draft proposal released earlier this month in the Federal Communications Commission's (FCC) proceeding entitled, "Implementation of Section 621(a(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection Act of 1992" (MB Docket No. 05-311). We find this proposal very concerning given the impact it will have on the vitality of New York's public, educational, and governmental (PEG) channels as well as its impact on Institutional Network (I-Net) services and broadband connections to schools and public buildings. As you and your colleagues vote on this item, we ask that you take into account the important role PEG stations and I-Net services play in local communities and ensure that the final outcome does not threaten the livelihood of PEG channels and I-Nets throughout New York and the nation.

We have heard from local governments and municipalities across our state who fear, if enacted, this rulemaking would undermine their ability to provide critical services to their communities by putting funding for these services at risk. New Yorkers rely on over seventy PEG channels across the state to keep up with their local government proceedings and business; town school board meetings; nearby high school and college news and events; religious news from local places of worship; important local and regional emergency alerts and related information; and other locally produced programming.

We believe your proposal as released in draft form would fundamentally change the terms of the carefully negotiated governing agreements between cable operators and Local Franchising Authorities (LFA). These agreements represent a meeting of the minds of what is fair and reasonable between the parties, based on extensive negotiations and the history between the parties. The cable operators derive significant benefits from those franchise agreements, and in return, the franchisees agree with the LFAs to provide support and channel capacity to PEG channels (along with other obligations to the local communities in which they are allowed to operate).

The changes proposed in your draft order would permit cable operators to put a dollar value on PEG channels along with certain other "in-kind contributions" and allow them to deduct that amount from their franchise fee payments. This proposal would restrict the ability of local municipalities to tailor cable franchise agreements to meet their unique community needs. In fact, we fear that this proposal would force local municipalities to choose between maintaining PEG channels, and other long-standing and mutually agreed-upon franchise provisions, or funding other critical services that benefit their communities.

In addition, we would like to emphasize the importance of I-Net services throughout New York City, and the potential impacts your proposal could have on them. It is our understanding that your draft order claims there will be no impact on I-Net services, and that the FCC is not preventing localities from including I-Net services in their franchise agreements. However, if the cost of the I-Net is now considered to be a part of the five percent franchise fee, then localities will be forced to decide which is more important – the I-Net services or the revenue from the fee. This once again puts local municipalities in a lose-lose situation, one that we fear could be detrimental to the I-Net system. We strongly urge you to rethink your proposal and the consequences it could have on cities like New York who rely heavily on I-Net services along with PEG channels.

Congress understood the important role PEG programming and I-Net services play in communities, and expressly intended for these services to flourish by being included in franchise agreements separate from the franchise fees. PEG channels act as a platform for local voices to be heard, news to be shared, and local government transparency to be enforced. Congress intended that LFAs have the authority to preserve the diversity of programming PEG provides through their franchise agreements. As it stands right now, your proposal would limit the ability of LFAs to take into account the needs of their local communities, as contemplated by the Communications Act, by undermining PEG channels around the country. We urge the FCC to reject any rule that would undermine the value PEG channels and I-Net services provide to New Yorkers and the rest of the country or harm existing local government authority over franchising agreements.

Thank you for taking the time to consider our concerns and for your attention to this issue.

Sincerely,

Kirsten Gillibrand
United States Senator

Charles E. Schumer
United States Senator

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 31, 2019

The Honorable Charles E. Schumer
United States Senate
322 Hart Senate Office Building
Washington, DC 20510

Dear Senator Schumer

Thank you for your letter regarding the impact that the statutory cap on franchise fees has on funding for public, educational, or governmental (PEG) channels and Institutional Network (I-Net) services. The Commission recently released the attached draft *Third Report and Order*, which the Commission plans to consider during its upcoming August meeting. While this draft may change in response to further input from stakeholders and Commissioners, we believe that it addresses in detail each of the concerns raised in your letter.

As you know, the Communications Act limits franchise fees to five percent of cable revenues and defines "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1). In *Montgomery County, Md. et al. v. FCC*, the U.S. Court of Appeals for the Sixth Circuit held that the terms "tax" and "assessment" were broad enough to encompass nonmonetary exactions—such as cable-related, in-kind contributions. 863 F.3d 485, 490-91 (6th Cir. 2017). But the court held that just because the statutory definition of "franchise fee" *could* include such nonmonetary contributions did not necessarily mean that it *did* include them, and it remanded the issue to the Commission for further consideration. *See id.* at 491-92.

In response to this remand, the Commission unanimously issued its *Second Further Notice of Proposed Rulemaking* to consider the scope of the congressionally-mandated statutory limit on franchise fees. The Commission developed a voluminous record in response to this notice, including numerous submissions from local franchising authorities, providers of PEG programming, and cable operators.

The draft order is the product of our careful consideration of this record. The result, we believe, is both consistent with the Act and responsive to your concerns regarding PEG programming and I-Net services. Among other things, the Commission observed that Congress broadly defined franchise fees; indeed, with respect to PEG channels, it only excluded support payments with respect to franchises granted prior to October 30, 1984 as well as certain capital costs required by franchises granted after that date. 47 U.S.C. §§ 542(g)(2)(B) & (C). The draft order therefore concludes that cable-related, in-kind contributions—including PEG-related contributions—are "franchise fees" subject to the Act's five-percent cap unless otherwise expressly excluded.

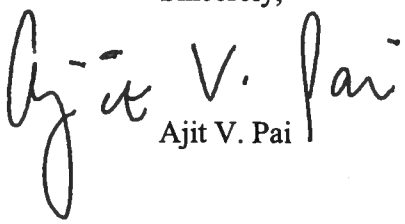
At the same time, the order defers ruling on the complex issues raised by PEG channel capacity and concludes that the costs of providing PEG channel capacity should not be offset against the franchise fee cap until the Commission can address the issue on a more complete record.

The draft order also broadens the Commission's interpretation of an exclusion for certain PEG-related capital costs. These latter two conclusions directly address the concerns raised in your letter concerning the order's potential impact on PEG programming.

Finally, your letter raises concerns about the effect of the draft order on I-Net services. While we recognize the benefits of I-Net services, we see no basis in the statutory text for concluding that the costs of providing I-Net services are excluded from the statutory definition of franchise fee. The draft order therefore concludes that the Commission must adhere to the statutory framework, which carves out only limited exclusions from franchise fees. We note that LFAs may still receive payments and in-kind contributions for I-Net services—but that such payments will be properly counted against the statutory five-percent franchise fee cap.

Again, thank you for your letter. Your views have been entered into the record of the proceeding and have been considered as part of the Commission's review. Please let me know if I can be of any further assistance.

Sincerely,



Ajit V. Pai

Attachment

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 31, 2019

The Honorable Kirsten Gillibrand
United States Senate
478 Russell Senate Office Building
Washington, DC 20510

Dear Senator Gillibrand

Thank you for your letter regarding the impact that the statutory cap on franchise fees has on funding for public, educational, or governmental (PEG) channels and Institutional Network (I-Net) services. The Commission recently released the attached draft *Third Report and Order*, which the Commission plans to consider during its upcoming August meeting. While this draft may change in response to further input from stakeholders and Commissioners, we believe that it addresses in detail each of the concerns raised in your letter.

As you know, the Communications Act limits franchise fees to five percent of cable revenues and defines "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. § 542(g)(1). In *Montgomery County, Md. et al. v. FCC*, the U.S. Court of Appeals for the Sixth Circuit held that the terms "tax" and "assessment" were broad enough to encompass nonmonetary exactions—such as cable-related, in-kind contributions. 863 F.3d 485, 490-91 (6th Cir. 2017). But the court held that just because the statutory definition of "franchise fee" *could* include such nonmonetary contributions did not necessarily mean that it *did* include them, and it remanded the issue to the Commission for further consideration. *See id.* at 491-92.

In response to this remand, the Commission unanimously issued its *Second Further Notice of Proposed Rulemaking* to consider the scope of the congressionally-mandated statutory limit on franchise fees. The Commission developed a voluminous record in response to this notice, including numerous submissions from local franchising authorities, providers of PEG programming, and cable operators.

The draft order is the product of our careful consideration of this record. The result, we believe, is both consistent with the Act and responsive to your concerns regarding PEG programming and I-Net services. Among other things, the Commission observed that Congress broadly defined franchise fees; indeed, with respect to PEG channels, it only excluded support payments with respect to franchises granted prior to October 30, 1984 as well as certain capital costs required by franchises granted after that date. 47 U.S.C. §§ 542(g)(2)(B) & (C). The draft order therefore concludes that cable-related, in-kind contributions—including PEG-related contributions—are "franchise fees" subject to the Act's five-percent cap unless otherwise expressly excluded.

At the same time, the order defers ruling on the complex issues raised by PEG channel capacity and concludes that the costs of providing PEG channel capacity should not be offset against the franchise fee cap until the Commission can address the issue on a more complete record.

The draft order also broadens the Commission's interpretation of an exclusion for certain PEG-related capital costs. These latter two conclusions directly address the concerns raised in your letter concerning the order's potential impact on PEG programming.

Finally, your letter raises concerns about the effect of the draft order on I-Net services. While we recognize the benefits of I-Net services, we see no basis in the statutory text for concluding that the costs of providing I-Net services are excluded from the statutory definition of franchise fee. The draft order therefore concludes that the Commission must adhere to the statutory framework, which carves out only limited exclusions from franchise fees. We note that LFAs may still receive payments and in-kind contributions for I-Net services—but that such payments will be properly counted against the statutory five-percent franchise fee cap.

Again, thank you for your letter. Your views have been entered into the record of the proceeding and have been considered as part of the Commission's review. Please let me know if I can be of any further assistance.

Sincerely,

Ajit V. Pai

Ajit V. Pai

Attachment